No. 82-608

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CROWN CENTER REDEVELOPMENT CORPORATION and HALLMARK CARDS, INCORPORATED,
Petitioners,

v.

SHIRLEY STOVER, *et al.*
Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court improperly certified a mandatory class action under Fed. R. Civ. P. 23(b)(1)(A) to determine liability for compensatory and punitive damages arising from a mass accident when the only risk of inconsistent adjudications is that the defendants may be found liable to some claimants but not to others.

2. Whether the district court improperly certified a mandatory class action under Fed. R. Civ. P. 23(b)(1)(B) to determine liability for, and amount of, punitive damages arising from a mass accident on the theory that multiple claims for punitive damages may create a "limited fund."

3. Whether the district court exceeded its authority in naming Shirley Stover as class representative without permitting any of the parties to develop or present evidence concerning her capacity to represent the class.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Crown Center Redevelopment Corporation ("Crown Center") and Hallmark Cards, Incorporated ("Hallmark")[1] conditionally cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.[2] Crown Center

[1] Pursuant to Rule 28.1 of this Court, petitioners state that Crown Center is a wholly-owned subsidiary of Hallmark, with no subsidiaries or affiliates except wholly-owned subsidiaries, and that Hallmark is a privately held corporation with no parent company. Hallmark's only subsidiary, other than wholly-owned subsidiaries, is Grupo H. d M, S.A. de C.V., a Mexican company.

[2] Parties to the proceedings in the Eighth Circuit, Nos. 82-1181 and 82-1207 (consolidated), were: Shirley Stover, a representative of the federal plaintiff class; the Honorable Scott O. Wright, United States District Judge for the Western District of Missouri; Jacqueline N. Rau; Melanie Hanson Johnson and Gerald Stanley Johnson,

(footnote continues)

and Hallmark request that this conditional cross-petition for a writ of certiorari be granted only if the Court grants the petition in *Shirley Stover v. Melanie Hanson Johnson, Gerald Stanley Johnson et al., and Jacqueline N. Rau,* No. 82-217 (filed August 6, 1982).[3] Crown Center and Hallmark, however, strongly oppose the petition in No. 82-217 for the reasons set forth in their brief in opposition.[4]

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 680 F.2d 1175. It is reproduced as Appendix A to the petition in No. 82-217. The opinion of the district court granting class certification is reported at 93 F.R.D. 415. The district court's opinion and accompanying order are reproduced as Appendix D to the petition in No. 82-217.

(footnote continued)

representing the members of the class who have individual actions pending in the Missouri state courts; Crown Center Redevelopment Corporation; Hallmark Cards, Incorporated; Hyatt Corporation; Eldridge & Son Construction Co., Inc.; Gillum-Colaco Consulting Structural Engineers, Inc.; Havens Steel Co.; PBNDML Architects Planners, Inc.; and Smith & Boucher, Inc.

[3] Crown Center and Hallmark Cards participated in the proceedings below as respondents, pursuant to Fed. R. App. P. 21(b). The Eighth Circuit in its decision mischaracterized Crown Center and Hallmark Cards as *amici curiae. See* Pet. 2a n.3. (References in the form "Pet." and "Pet. App." are to the petition for a writ of certiorari filed in No. 82-217 (filed August 6, 1982) and the appendix to that petition.)

[4] Counsel for the following defendants in the various state and federal skywalk cases have asked that we inform the Court that their clients join in the views set forth in this conditional cross-petition: Concordia Project Management Ltd.; Eldridge & Son Construction Co., Inc.; General Testing Laboratories, Inc.; Gillum-Colaco Consulting Structural Engineers, Inc.; Havens Steel Co.; H&R Inspection Service, Inc.; Hyatt Corp.; Marshall & Brown, Incorporated; Midwest Mechanical Contractors, Inc.; National Fire Sprinkler Corp.; PBNDML Architects Planners, Inc.; and Seiden & Page, Inc.

JURISDICTION

The judgment of the Eighth Circuit was entered on June 7, 1982. Motions for rehearing and rehearing *en banc* were denied on July 9, 1982. This conditional cross-petition is filed pursuant to Rule 20.5 of this Court. The Court has jurisdiction over this conditional cross-petition under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The pertinent provisions of the statutes and rules involved are as follows:

Federal Rules of Civil Procedure 23(a) and 23(b):

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> >
> > > (A) inconsistent or varying adjudications with respect to individual

members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT

The petition in No. 82-217 and this conditional cross-petition both stem from litigation generated by the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri, on July 17, 1981. The petitioner in No. 82-217 seeks review of the decision of the United States Court of Appeals for the Eighth Circuit vacating the certification of a mandatory class action under Rule 23(b)(1) by the United States District Court for the Western District of Missouri. Crown Center and Hallmark believe that the petition in No. 82-217 should be denied for the reasons set forth in their brief in opposition. This conditional cross-petition is being filed in order to raise issues concerning the impropriety of the district court's certification of a mandatory class action in the event this Court were to grant the petition in No. 82-217. These issues are integrally related to the questions presented in No. 82-217 and provide an alternative ground for affirming the judgment of the Eighth Circuit. Considerations of sound judicial administration support review of the questions presented by this conditional cross-petition if the Court decides to grant review in No. 82-217.

1. The collapse of the Hyatt skywalks was followed by the filing of numerous personal injury and wrongful death actions. Of the approximately 150 cases brought within six months of the collapse, all but 18 were filed in the Circuit Court of Jackson County, Missouri. The few cases not brought in Missouri state court were filed in the United States District Court for the Western District of Missouri. Jurisdiction in all of the cases filed in federal court is based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

The flood of lawsuits generated by the collapse initially proceeded expeditiously, with individual cases consolidated for pretrial discovery which was coordinated

in the state and federal courts. Prior to the federal court's certification of a class action in January 1982, more than 120 bodily injury and wrongful death claims had been settled through the payment of more than $18 million to compensate victims and their families. *See* Affidavit of Michael E. Waldeck, dated March 4, 1982 (Supplemental Appendix in Nos. 82-1181 and 82-1207 (consolidated) (8th Cir.), Exhibit 50).

2. In October 1981, after numerous individual state and federal court cases had been filed, a single plaintiff, Molly Riley, moved in federal district court for certification of a class action. One hundred seventy-five potential class members with claims arising from the accident filed affidavits in opposition to that class certification motion. *See* Supplemental Appendix in Nos. 82-1181 and 82-1207 (consolidated) (8th Cir.), Exhibit 73.

On January 25, 1982, the federal court denied plaintiff Riley's motion for class certification on the ground that she had "failed to join certain parties who are needed for a just adjudication." Pet. App. 42a, 61a.[5] After rejecting as a class representative the only plaintiff who had sought class action treatment, the district judge took the extraordinary step of commencing his own "search of court records in order to determine which federal court plaintiffs could serve as representatives of the class." Pet. App. 43a. Without prior notice to the parties or an opportunity for them to address the critical question of adequacy of representation, the court *sua sponte* certified a class action and named four plaintiffs, including Mrs. Stover, as class representatives. Pet. App. 43a, 61a. The court apparently selected these plaintiffs as class representatives solely on the grounds that they "have citizenships diverse from the defendants who have been sued" and they did not record

[5] Ms. Riley, a Kansas resident, had failed to join two Kansas defendants because she lacked diversity of citizenship to them. Pet. App. 40a, 44a.

opposition to the certification of a class action. Pet. App. 43a.[6] Soon after the court issued its class certification order, it was discovered that two of the plaintiffs named as class representatives by the federal judge lacked the necessary diversity of citizenship and that a third had already settled his claim. Mrs. Stover thus remained as the only representative of the plaintiff class.

The federal court's order established a mandatory class action under Rule 23(b)(1). The court certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages and under Rule 23(b)(1)(B) on the issues of liability for, and amount of, punitive damages. Pet. App. 50a-55a. The court certified the Rule 23(b)(1)(A) class in order to protect the defendants "from inconsistent adjudications on the liability issues." Pet. App. 51a. The court certified the issues of liability for, and amount of, punitive damages under Rule 23(b)(1)(B) because "the funds available to pay for punitive damages appear to be limited." Pet. App. 53a.

While the district court stated that settlements of "actual damages" could continue, it ruled that "claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues." Pet. App. 60a. Because claimants could no longer enter into comprehensive settlements of their claims for actual and punitive damages, the settlement process was halted by the district court's order and no additional claims were settled until the class certification was vacated by the Eighth Circuit.

3. The district court refused to certify its class action order for interlocutory appeal under 28 U.S.C. § 1292(b).

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[6] The court also took the unusual step of appointing Ms. Riley's attorneys as lead class counsel even though they did not represent any of the named class representatives and their client had been rejected as an inappropriate class representative. Pet. App. 48a.

Therefore, both a petition for mandamus and an appeal under 28 U.S.C. § 1292(a)(1) were filed by individual members of the class who objected to the certification. The court of appeals consolidated these cases and, on June 7, 1982, vacated the class certification order.

The Eighth Circuit found that, "contrary to the class's assertion, the district court expressly prohibited class members from settling their punitive damage claims." Pet. App. 9a. As a result, the court of appeals concluded "on the facts before us" that the "substantial effect of the order" was injunctive in character and that the order therefore was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. 8a-9a. The Eighth Circuit held that the certification order violated the Anti-Injunction Act, 28 U.S.C. § 2283, because it prevented the settlement and prosecution of actions pending in state court. It found that the only exception to the Act invoked by the class—the exception for injunctions necessary in aid of the federal court's jurisdiction—did not apply on the facts of this case. Pet. App. 12a-15a. In vacating the class certification order, the majority rested exclusively on the Anti-Injunction Act.

Judge Heaney, in his dissent, agreed that the "district court's class certification order expressly prohibits class members from settling their punitive damage claims" and thus constituted an "express injunction." Pet. App. 19a n.1; 34a n.16. He departed from the majority in concluding that, if modified to delete the prohibition against settlements, the inherent restrictive effects of the order certifying a mandatory class action would come within the exception to the Anti-Injunction Act for injunctions necessary in aid of the federal court's jurisdiction. Pet. App. 33a-37a & nn.16-17. Judge Heaney also found that "the district court's reliance on Rule 23(b)(1)(A) was misplaced," but concluded that a class action on the issues of

liability for compensatory and punitive damages and the amount of punitive damages was properly certified under Rule 23(b)(1)(B). Pet. App. 23a-27a.

REASONS FOR GRANTING THE PETITION

If the Court decides to grant the petition in No. 82-217, it should also grant this conditional cross-petition for the reasons set forth below.

1. The conditional cross-petition raises issues concerning the impropriety of the district court's certification of a mandatory class action that are closely connected to the questions presented by the petition in No. 82-217. Petitioner in No. 82-217 asserts that the Eighth Circuit's "decision eviscerates mandatory class actions in the federal courts" (Pet. 7) and asks this Court to rule that the district court's injunction against pending state court actions was necessary in aid of its jurisdiction to certify a mandatory class action (Pet. 10-14). However, unless the Court first examines the threshold class certification issue and concludes that the district court correctly certified a Rule 23(b)(1) class action, it would simply be rendering an abstract, advisory ruling on the Anti-Injunction Act.

2. Sound judicial administration also requires that the conditional cross-petition be granted if the Court decides to review the judgment of the Eighth Circuit. Such review would entail a significant delay in the trial of the claims of many of the victims of the skywalk collapse. If such a delay were to occur, it should at least produce a definitive ruling regarding the procedural posture of these cases.

A ruling on the merits of the questions presented in the petition would not clarify the procedural status of these cases unless the class action issues raised in the

conditional cross-petition are also resolved. If the Eighth Circuit's Anti-Injunction Act decision were upheld by this Court, the parties would still face the question whether a Rule 23(b)(1) class could be ordered for all claimants other than those who have already commenced actions in state court.[7] Similarly, if this Court were to reverse the Eighth Circuit's decision without addressing the class action issue, the parties would be required to return to the Eighth Circuit for a decision on the class action questions, since those questions were not reached by the majority in the court of appeals. As noted below (pp. 11-14, *infra*), an Eighth Circuit decision sustaining the certification of a mandatory class action would create a conflict among the circuits that in turn would require further review by this Court.[8] In these circumstances, if the petition in No. 82-217 is granted, the strong policy against piecemeal adjudication supports the grant of the conditional cross-petition to enable this Court to resolve in a single proceeding the issues raised by the district court's class certification.

In addition, if the Court undertakes review of the Eighth Circuit's decision, it should have the benefit of briefing and argument by the parties on the full range of alternative dispositions. Since it might rely on the impropriety of the class action certification as an alternative basis for affirming the judgment of the Eighth Circuit, the Court should grant the cross-petition to assist its consideration of the class action issues.

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[7] Counsel for Mrs. Stover have already requested the district court to certify such a modified Rule 23(b)(1) class action on a conditional basis pending this Court's ruling on the petition in No. 82-217, although the district court to date has refused to do so. *See In re Federal Skywalk Cases*, No. 81-0945-A-CV-W-5 (W.D.Mo., September 17, 1982).

[8] If this Court declined to review the class certification issue after a decision of the Eighth Circuit on remand, the parties would be faced with the prospect of conducting a lengthy and expensive trial of the class action, only to have the outcome set aside on appeal from the final judgment or subject to collateral attack.

3. The district court's certification of a mandatory class action in this case under Rule 23(b)(1) is clearly in error and conflicts with courts of appeals' decisions as well as decisions of this Court.

a. The district court certified a Rule 23(b)(1)(A) class on the issues of liability for compensatory and punitive damages in order to protect the defendants in the skywalk cases "from inconsistent adjudications on the liability issues." Pet. App. 51a. Numerous courts have found, however, that this rationale is wholly inadequate to support certification of a Rule 23(b)(1)(A) class action. *See, e.g., Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 & n.10 (9th Cir. 1976); *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Esler v. Northrop Corp.*, 86 F.R.D. 20, 37-38 (W.D. Mo. 1979). As one commentator explained:

> "Rule 23(b)(1)(A) does not include a situation in which the risk of inconsistent results in a series of individual actions simply means that the defendant would prevail in some cases and not in others and therefore would have to pay damages to some claimants but not to others. Examples would be mass tort cases or any other typical damage actions." A. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 43 (1977).

Under the district court's reasoning, all mass tort cases would become mandatory class actions. Moreover, as the Ninth Circuit noted in connection with a similar class certification, such an interpretation of Rule 23(b)(1)(A) would "render superfluous the detailed provisions of subdivision (b)(3)" and therefore must be rejected as "untenable." *McDonnell Douglas Corp. v. United States District Court, supra*, 523 F.2d at 1086.

b. The district court's certification of a class under Rule 23(b)(1)(B) is equally infirm. Rule 23(b)(1)(B) requires a finding "that individual adjudications might as a practical matter dispose of the interests of other class members or substantially impair or impede their ability to protect their interests." *Reynolds v. National Football League*, 584 F.2d 280, 283 (8th Cir. 1978). Reliance on a Rule 23(b)(1)(B) class action is appropriate "when claims are made by numerous persons against a fund insufficient to satisfy all claims." *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, Advisory Committee's Notes, 39 F.R.D. 69, 101 (1966).

The district court acknowledged, however, that the record in this case does not support a Rule 23(b)(1)(B) class action for compensatory damages since "the availability of sufficient funds to cover the claims for compensatory damages is not presently in question." Pet. App. 52a. The district court nevertheless concluded that the skywalk cases came within the "limited fund" rationale because "there is the possibility that few, if any, defendants will be found liable for punitive damages" and that the law may not permit "more than one award of punitive damages" against a defendant for a single wrongful act. Pet. App. 53a.

Rule 23(b)(1)(B), however, is inapplicable to claims for punitive damages. The basic prerequisite for a Rule 23(b)(1)(B) class action—a threat to " 'the substance of the rights of others having similar claims,' " *McDonnell Douglas Corp. v. United States District Court*, *supra*, 523 F.2d at 1086, *quoting LaMar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973)—is not present because no plaintiff has a right to recover punitive damages. As this Court has recently noted:

> "Punitive damages by definition are not intended to compensate the injured party, but

> rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981).[9]

"So far is this opportunity [to recover punitive damages] from being a fundamental personal right that it is an interest not truly personal in nature at all." *In re Paris Air Crash*, 622 F.2d 1315, 1319-20 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980).

The limited fund rationale is also inapplicable to punitive damage claims in this case since, under Missouri law, the net worth of the defendant is a factor in determining the amount of an award of punitive damages.[10] The self-adjusting nature of punitive damages distinguishes punitive damage claims from the paradigm "limited fund" case in which multiple creditors assert individual claims for actual damages that, when realistically assessed, exceed the defendant's net worth.

In addition to these fundamental deficiencies, the district court plainly erred in relying on the total amount of punitive damages requested by the skywalk plaintiffs in their complaints as a basis for invoking the "limited fund" rationale. As numerous courts have held, a class action may not be certified on a "limited fund" theory based upon the prayers for damages set forth in the plaintiffs' complaints. *See, e.g., In re Northern District of California,*

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[9] Missouri courts have long recognized that punitive damages "are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts." *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S.W. 878, 880 (Mo. 1902); *see State ex rel. Smith v. Greene*, 494 S.W.2d 55, 60 (Mo. 1973) (en banc).

[10] *See, e.g., Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479, 486 (Mo. 1972); *Comegys v. Chrysler Credit Corp.*, 577 S.W.2d 873, 880 (Mo. App. 1979); *Citizens Bank of University City v. Gehl*, 567 S.W.2d 423, 426 (Mo. App. 1978).

Dalkon Shield IUD Products Liability Litigation, Nos. 81-4648 through 81-4656, slip op. at 3033 (9th Cir. June 18, 1982, as amended, July 15, 1982); *In re Agent Orange Products Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980); *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979).[11] Since large punitive damage awards are routinely requested but are rarely awarded in nonintentional tort cases, punitive damage claims are a particularly inappropriate gauge of the existence of a "limited fund" justifying the certification of a Rule 23(b)(1)(B) class action.[12]

The rationale underlying the district court's certification of a Rule 23(b)(1)(B) class action for punitive damages should be rejected since it would transform all mass tort cases involving punitive damage claims into mandatory class actions and would automatically deprive individual plaintiffs of the ability to control their personal injury or wrongful death cases through counsel of their own choosing.

c. The district court also ignored its responsibility under Rule 23(a)(4) to ensure that "the representative parties will fairly and adequately protect the interests of

[11] In the *Dalkon Shield* case, the Ninth Circuit held that the "limited fund" theory is applicable only if early damage awards will "necessarily affect later claims." Slip op. at 3033. In contrast, the district court in this matter certified the class under Rule 23(b)(1)(B) simply because of the possibility that a limited fund may exist. Pet. App. 52a-53a.

[12] The erroneous nature of the district court's application of the "limited fund" rationale is underscored by its assertion that a limited fund is present in these cases because it is possible that "few, if any, defendants will be found liable for punitive damages." Pet. App. 53a. The tenuous nature of the plaintiffs' punitive damage claims cannot properly serve as a justification for requiring that cases proceed as a mandatory class action.

the class."[13] As this Court recently reiterated, a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. v. Falcon*, 50 U.S.L.W. 4638, 4642 (U.S. June 14, 1982). Adequacy of representation ordinarily cannot be determined on the basis of the pleadings alone. *See, e.g., Satterwhite v. City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978), *vacated on other grounds*, 445 U.S. 940 (1980); *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974). Rather, "the parties must be afforded the opportunity to discover and present documentary evidence on the issue." *Walker v. World Tire Corp., Inc.*, 563 F.2d 918, 921 (8th Cir. 1977).

The district court here erred in certifying a class action without any record concerning adequacy of representation. The parties were neither given prior notice of the identities of the proposed class representatives nor an opportunity to develop a record on which the court could make an informed decision concerning the capacity of the proposed representatives to protect the interests of the class. The dangers posed by the district court's inattention to the critical question of adequacy of representation were underscored by the fact that, soon after entry of the *sua sponte* class certification, three of the four plaintiffs named by the court as class representatives had to be removed as unqualified. *See* pp. 6-7, *supra*. Despite this development, no exploration of the adequacy of the fourth named plaintiff, Mrs. Stover, was permitted by the district court.

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[13] This requirement is basic to the proper functioning of the class action procedure, since class members will not be bound by any judgment entered in the absence of adequate representation. *See Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

CONCLUSION

If review is granted in No. 82-217, this conditional cross-petition should also be granted.

Respectfully submitted.

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